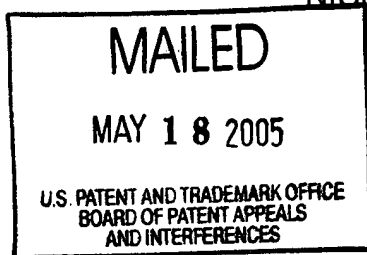


UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte JOHN T. PUGACZEWSKI, JEFFREY T. KAYS,
NICHOLAS P. CHANTILLOUPE, and FRED M. HENDRICKS



Appeal No. 2004-0855
Application No. 09/469,206

ON BRIEF

Before HAIRSTON, FLEMING, and BARRY, *Administrative Patent Judges*.
BARRY, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

A patent examiner rejected claims 1-10. The appellants appealed; we affirmed. *Ex parte Pugaczewski*, No. 2004-0855, slip op. at 1 (Bd.Pat.App. & Int. Nov. 26, 2004). Pursuant to 37 C.F.R. § 41.52(a)(1), the appellants now ask us to reconsider our affirmance. (Req. Reh'g at 1.) We grant.

OPINION

Rather than reiterate the position of the appellants *in toto*, we focus on their sole point of contention. To wit, they "contend that there is no structure within Jones for performing throttling of the network connection at the switch such that the connection

bandwidth between the switch and the user access point is limited by the user selected bandwidth." (Req. Reh'g at 2.)

In addressing the point of contention, the Board conducts a two-step analysis. First, we construe the independent claims to determine their scope. Second, we determine whether the construed claims are anticipated or would have been obvious.

1. CLAIM CONSTRUCTION

"Analysis begins with a key legal question — *what is the invention claimed?*" *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1567, 1 USPQ2d 1593, 1597 (Fed. Cir. 1987). In answering the question, "[t]he Patent and Trademark Office (PTO) must consider all claim limitations when determining patentability of an invention over the prior art." *In re Lowry*, 32 F.3d 1579, 1582, 32 USPQ2d 1031, 1034 (Fed. Cir. 1994) (citing *In re Gulack*, 703 F.2d 1381, 1385, 217 USPQ 401, 403-04 (Fed. Cir. 1983)).

Here, claim 1 recites in pertinent part the following limitations: "to throttle the network connection at the switch such that the connection bandwidth between the switch and the user access point is limited by the user selected bandwidth. . . ."

Claim 7 recites similar limitations. Considering these limitations, the independent claims require throttling a network connection at a switch so that **the connection**

bandwidth between the switch and a user's access point is limited to a bandwidth selected by the user.

2. ANTICIPATION AND OBVIOUSNESS DETERMINATIONS

"Having construed the claim limitations at issue, we now compare the claims to the prior art to determine if the prior art anticipates those claims." *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1349, 64 USPQ2d 1202, 1206 (Fed. Cir. 2002). "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987) (citing *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 715, 223 USPQ 1264, 1270 (Fed. Cir. 1984); *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548, 220 USPQ 193, 198 (Fed. Cir. 1983); *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 771, 218 USPQ 781, 789 (Fed. Cir. 1983)). "[A]bsence from the reference of any claimed element negates anticipation." *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571, 230 USPQ 81, 84 (Fed. Cir. 1986).

Here, Jones discloses "a technique by which a user conveys to network intelligence a request to operate a digital subscriber loop (DSL) in a particular manner." Col. 4, ll. 13-15. After "establish[ing] a communications session," *id.* at l. 16, "the

technique allows a user to communicate to a network intelligence device a first line mode of accessing [a] network." *Id.* at ll. 17-19. Thereafter, "the technique permits the user to request that the network intelligence device change the communications session to a second line mode of accessing the network." *Id.* at ll. 19-21. The possible "[a]ccess line modes include available bit rate (ABR), variable bit rate (VBR) and constant bit rate (CBR) applications." *Id.* at ll. 23-25.

A user operating in the VBR mode, for example, may change to the CBR mode. Figure 4 of the reference "depicts a flow diagram 402," col. 10, l. 56, of how this is done. First, a "user 104 communicates a desired access line mode to network intelligence 114 through user control interface 118 and 'D' channel signaling." Col. 10, ll. 58-60. Because the user has requested the CBR mode, "operation branches to step 410," col. 11, ll. 24-26, and "the network intelligence 114 verifies whether the network has sufficient unused capacity to fulfill the CBR request of user 104." *Id.* at ll. 36-38. "The verification . . . entails processes of validation, protocol/bit-rate negotiation, routing, and handshaking. If network intelligence 114 determines that the network has sufficient capacity to fulfill the CBR request, then operation continues with step 416." *Id.* at ll. 38-43. "In step 416, local switch fabric 110 connects the signal of user 104 through transport bandwidth 112 for CBR mode access," *id.* at ll. 46-48, and "CBR communication proceeds." *Id.* at l. 49.

Although the CBR mode limits the user's bit rate to a constant rate, we are unpersuaded that it limits the connection bandwidth between the local switch fabric 110 and the user's control interface 118 to a bandwidth selected by the user. The absence of limiting the connection bandwidth between a switch and a user's access point to a bandwidth selected by the user negates anticipation. Therefore, we reverse the anticipation rejection of claim 1 and of claim 4, which depends therefrom.

"In rejecting claims under 35 U.S.C. Section 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness." *In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993) (citing *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992)). "A *prima facie* case of obviousness is established when the teachings from the prior art itself would appear to have suggested the claimed subject matter to a person of ordinary skill in the art." *In re Bell*, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993) (quoting *In re Rinehart*, 531 F.2d 1048, 1051, 189 USPQ 143, 147 (CCPA 1976)).

Here, the examiner does not allege, let alone show, that the addition of Ravi, Farnsworth, or Ma cures the aforementioned deficiency of Jones. Absent a teaching or suggestion of limiting the connection bandwidth between a switch and a user's access point to a bandwidth selected by the user, we are unpersuaded of a *prima facie* case of

obviousness. Therefore, we reverse the obviousness rejections of claims 2, 3, and 5-10.

CONCLUSION

In summary, we grant the appellants' request to reverse the rejection of claims 1 and 4 under § 102(e) and the rejections of claims 2, 3, and 5-10 under § 103(a).

GRANTED

KENNETH W. HAIRSTON
Administrative Patent Judge

MICHAEL R. FLEMING
Administrative Patent Judge

~~LANCE LEONARD BARRY~~
~~Administrative Patent Judge~~

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